APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED APRIL 20, 1999

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 98-60486
Summary Calendar

RELIANCE NATIONAL INSURANCE COMPANY, a corporation,

Plaintiff-Counter Defendant-Appellee,

versus

ESTATE OF MICHAEL D. TOMLINSON, Deceased, Et Al.,

Defendants,

LELIA BRANNING TUCKER, the mother of April Tenille Branning on behalf of Lester Branning, father of April Tenille Branning and Scott Branning, brother of April Tenille Branning and heirs and wrongful death beneficiaries of April Tenille Branning; LESTER BRANNING; SCOTT BRANNING; MICHAEL D. RIVES,

Defendants-Counter Claimants-Appellants.

* * * * *

Appendix A

LELIA BRANNING TUCKER, the mother of April Tenille Branning on behalf of Lester Branning, father of April Tenille Branning and Scott Branning, brother of April Tenille Branning and heirs arid wrongful death beneficiaries of April Tenille Branning; MICHAEL D. RIVES,

Plaintiffs,

versus

ESTATE OF MICHAEL D. TOMLINSON; ET AL.,

Defendants.

Appeals from the United States District Court
for the Southern District of Mississippi

Before POLITZ, WIENER, and DENNIS, Circuit Judges.

POLITZ, Circuit Judge:

Michael Rives and the survivors of April Tenille Branning appeal an adverse summary judgment as relates to certain insurance coverage. For the reasons assigned, we affirm.

BACKGROUND

This litigation arises out of a plane crash that occurred after Michael Tomlinson had been drinking alcohol at a local tavern and invited some of the tavern's patrons for a late night airplane ride. From the tavern, Tomlinson and the

others traveled to the John Bell Williams Airport, which he managed. Tragically, the plane piloted by Tomlinson crashed, killing Tomlinson and April Branning, and injuring Michael Rives and Monica Hancock.

Proceeding in state court, appellants sued the Estate of Michael Tomlinson, Tomlinson Avionics, Inc. (Airport Manager by contract), and Tomlinson Avionics of Mississippi, Inc. (Agent of Airport Manager by contract) on the basis that Tomlinson acted within the scope of his employment and that the Tomlinson entities were responsible for their damages. Appellants also sued Hinds Community College on the basis that it was responsible for Tomlinson's acts as leaseholder of the airport. The state court entered summary judgment for Hinds.

The Tomlinson entities were covered by several insurance policies, including policies issued by Titan Insurance Company, Ranger Insurance Company, and appellee, Reliance National Insurance Company. Appellants settled with Titan. In appellants' action against Ranger, the court *à quo* entered summary judgment for Ranger based on an "owned aircraft" exclusion.[1] Appellants and the Tomlinson entities entered into consent judgments by which appellants could recover only against insurance proceeds.

Reliance petitioned for a declaratory judgment declaring that the insurance policy it issued to Hinds did not cover Tomlinson, Tomlinson Avionics, Inc., or Tomlinson

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1. **Ranger Ins. Co. v. Branning**, 984 F. Supp. 466 (S.D. Miss. 1997).

Avionics of Mississippi, Inc.[2] Reliance moved for a summary judgment on the grounds that Tomlinson acted outside the scope of his employment and that a provision of the policy excluded coverage. The district court determined that the policy issued by Reliance did not cover Tomlinson or the Tomlinson entities because of the exclusion, and it entered summary judgment for Reliance. Appellants challenge the grant of summary judgment.

ANALYSIS

We review grants of summary judgment *de novo*.[3] The Federal Rules of Civil Procedure provide that summary judgment shall be entered when there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[4] We must consider the evidence, and reasonable inferences drawn therefrom, in the light most favorable to the nonmoving party.[5]

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2. The appellants also filed Writs of Garnishment in state court based on the consent judgments. Reliance removed these actions which were consolidated with the declaratory judgment action.

3. **Centennial Ins. Co. v. Ryder Truck Rental, Inc.**, 149 F.3d 378 (5th Cir. 1998).

4. FED. R. CIV. P. 56; **Celotex Corp. v. Catrett**, 477 U.S. 317 (1986).

5. **Deus v. Allstate Ins. Co.**, 15 F.3d 506 (5th Cir. 1994).

Appendix A

Because our jurisdiction is based upon diversity, we apply Mississippi law in interpreting the insurance policies.[6] First, where an insurance policy is plain and unambiguous, the court must construe the instrument exactly as written. Second, the court should read the policy as a whole, giving effect to all provisions. Third, the court must interpret ambiguities against the insurer. Fourth, the court must interpret exclusion clauses narrowly.[7]

Owned Aircraft Exclusion

Appellants first contend that the district court erred in determining that an exclusion clause relieved Reliance of its obligations under the policy. Hinds purchased a Comprehensive General Liability policy to insure itself against particular liabilities that it might encounter as leaseholder of the airport. The policy excluded any bodily injury arising out of ownership, maintenance, operation, use, loading, or unloading of: (1) any aircraft owned or operated by or rented or loaned to the named insured, or (2) any other aircraft operated by any person in the course of his employment by the named insured.

Because Hinds did not intend to serve as manager of the airport, it purchased a rider that provided limited coverage for any airport manager that it appointed. Provision 3 of the

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6. The parties agree that the substantive law of Mississippi governs our decision. **Erie R.R. Co. v. Tomkins**, 304 U.S. 64 (1938).

7. **Centennial Ins. Co.**, 149 F.3d at 382-83 (listing these and other rules of interpretation).

Special Airport Provisions provides that the "exclusion in the policy with respect to aircraft applies only to aircraft owned by or rented or loaned to the insured or in flight by or for the account of the insured." The district court determined that Reliance was not obligated under the policy to provide coverage because Tomlinson Avionics, Inc. owned the plane that crashed and Provision 3 excluded from coverage the injuries suffered by appellants.

Appellants suggest that the "insured" described in Provision 3 was Hinds, and that this exclusion should not apply to the Tomlinson entities. We reject this suggestion. Provision 1 of the Special Airport Provisions extends the coverage of "Persons Insured" to include "any airport manager of the named insured."[8] The policy defined "insured" as "any person or organization qualifying as an insured in the 'Persons insured' provision of the applicable insurance coverage. . . ." We conclude that the Tomlinson entities are "Persons insured."

We find the text of Provision 3, the owned aircraft exclusion, unambiguous, and conclude that it relieves Reliance of any obligation to provide coverage. Tomlinson Avionics, Inc. *owned* the aircraft in question; Tomlinson Avionics, Inc. *loaned* the aircraft to Tomlinson Avionics of Mississippi, Inc.; Tomlinson himself *flew* the aircraft in question. The owned aircraft exclusion applies in each of

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8. The policy extended coverage to any airport manager "acting within the scope of his duties." The district court assumed that Tomlinson was acting within the scope of his duties. For purposes of this decision we make the same assumption.

these instances and relieves Reliance of its obligations under the policy.

Even assuming that this one isolated owned aircraft provision is unambiguous, appellants insist that there is an ambiguity with respect to coverage when the owned aircraft provision is read in light of the next provision, and, the argument continues, the rules of insurance policy interpretation require that ambiguities be interpreted to favor coverage. According to appellants, the ambiguity arises because after the owned aircraft provision that excludes coverage, Provision 4(b) limits "any loss arising out of the ownership, maintenance or use of aircraft . . . with respect to which the insured has other valid and collectible insurance, whether primary or excess." Appellants contend that this provision limiting coverage would be superfluous if the owned aircraft provision actually excluded coverage entirely. Therefore, appellants propose, this contradiction creates an ambiguity which obligates Reliance to provide coverage.

The owned aircraft provision, however, clearly excludes from coverage the injuries of which appellants complain. Mississippi law requires us to give effect to that unambiguous exclusion. Appellants correctly note that the rules of insurance policy interpretation require us to give meaning to every provision. Exclusion from coverage is consistent with both Provision 3 and Provision 4(b); appellants' position runs contrary to Provision 3.

Alternate Theories of Liability

Appellants maintain that regardless of the court's conclusion as to the owned aircraft exclusion, the alternate

causes of action that they asserted, which can be cabined within the theories of negligent entrustment and negligent supervision, do not implicate that exclusion. Appellants contend that these claims are separate and distinct from the ownership or use of an aircraft, and thus fall outside of the reach of the exclusion and give rise to a duty to defend. Therefore, appellants conclude, the district court erred in entering summary judgment for Reliance.

Our research discloses no dispositive decisions by the Mississippi Supreme Court. Accordingly, we must predict how that court would rule. In making this prediction, we should look to: (1) the decisions of the Mississippi Supreme Court in analogous cases, (2) the rationales and analyses underlying those decisions, (3) dicta by the Mississippi Supreme Court, (4) lower state court decisions, (5) the general rule on the question, (6) decisions by the courts of other states when Mississippi courts have turned to them in formulating substantive law, and (7) other available sources, such as treatises and legal commentaries.[9] Absent evidence to the contrary, we presume that the Mississippi Supreme Court would adopt the majority rule.[10]

Focusing first on negligent entrustment, a majority of jurisdictions addressing the issue have concluded that if an owned aircraft exclusion relieves an insurer of its obligation when the injury arises out of the ownership, operation, or use of the aircraft, then the exclusion similarly relieves

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9. **Centennial Ins. Co.**, 149 F.3d at 382.

10. **Id.**

the insurer of any obligation arising out of negligent entrustment.[11] The majority rule recognizes that liability for the negligent entrustment of an aircraft is derivative of a negligent use of that aircraft.[12] Because an owned aircraft provision excludes coverage for negligent use, the provision also excludes coverage for negligent entrustment. As to automobiles, the established law of Mississippi is that there can be no liability for negligent entrustment without a subsequent negligent use of that automobile.[13] We believe that the Mississippi Supreme Court would extend this rule to aircraft, and we presume that the court would follow the majority rule regarding owned aircraft provisions. It follows

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11. **Allstate Ins. Co. v. Ellison**, 757 F.2d 1042 (9th Cir. 1985); **Fox Hills Country Club, Inc. v. American Ins. Co.**, 570 S.W.2d 275 (Ark. 1978); **State Farm Fire Cas. Co. v. Keenan**, 216 Cal. Rptr. 318 (Cal. Ct. App. 1985); **Great Am. Indem. Co. v. City of Corpus Christi**, 192 S.W.2d 917 (Tex. Civ. App.-San Antonio 1945, writ ref'd n.r.e.) (finding coverage because of an "exception to the exception"); **Transport Indem. Co. v. Sky-Kraft, Inc.**, 740 P.2d 319 (Wash. Ct. App. 1987).

Where decisions are lacking, courts should draw from other fields of insurance law. 7A JOHN ALAN APPLEMAN, INSURANCE LAW AND PRACTICE, §4501.01, at 238 (1979). The majority rule is the same when the issue concerns "owned automobile" exclusions. **Love v. McDonough**, 758 F. Supp. 397, 400-02 (W.D. Miss.) (collecting cases), *aff'd mem.*, 947 F.2d 1486 (5th Cir. 1991).

12. **Fox Hills Country Club, Inc.**, 570 S.W.2d at 277 ("arising out of"); **State Farm Fire Cas. Co.**, 216 Cal. Rptr. at 330 ("solely and indivisibly related"); **Transport Indem. Co.**, 740 P.2d at 327 ("indivisibly related").

13. **Somerville v. Keeler**, 145 So. 721 (Miss. 1933).

that because that provision relieves Reliance of any duty to defend against the negligent use of an aircraft, Reliance is also relieved of any obligation to defend against the alleged negligent entrustment of the aircraft.

The majority rule concerning negligent supervision is the same as that concerning negligent entrustment: Negligent supervision claims are excluded from coverage by owned aircraft provisions when the acts alleged could not have resulted in injury but for the use of the aircraft.[14] Negligent supervision is so intertwined with the use of the aircraft that when usage is excluded from coverage, so too are claims of negligent supervision.[15] We believe that the Mississippi

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14. **Littrall v. Indemnity Ins. Co. of N. Am.**, 300 F.2d 340 (7th Cir. 1962) (negligent direction); **State Farm Fire Cas. Co.**, 216 Cal. Rptr. at 330-32 (negligent instruction); **Hartford Fire Ins. Co. v. Superior Ct. of Cal.**, 191 Cal. Rptr. 37 (Cal. Ct. App. 1983) (negligent planning); **Safeco Ins. Co. of America v. Husker Aviation, Inc.**, 317 N.W.2d 745 (Neb. 1982) (negligent training & supervision); **Wilkins v. American Motorists Ins. Co.**, 388 S.E.2d 191 (N.C. Ct. App. 1990) (negligent instruction); **Transport Indem. Co.**, 740 P.2d at 327 (negligent instruction); *see also* **Love**, 758 F. Supp. at 402 ("Application of the exclusion is not dependent on the theory of liability asserted.").

15. *E.g.*, **State Farm Fire Cas. Co.**, 216 Cal. Rptr. at 332 (negligent instruction "depend[s] on . . . use and operation of an aircraft"); **Safeco Ins. Co. of Am.**, 317 N.W.2d at 748 (negligent training "directly related to the operation" of the aircraft). Our conclusion is consistent with that of the opinion by the district court in a case that originates from the same incident as this one. **Ranger Ins. Co.**, 984 F. Supp. at 469 (excluding from coverage "each and every claim . . . asserted [because each had] as its aim the recovery of damages for bodily injury which arose directly and solely from Tomlinson's use of the aircraft").

Appendix A

Supreme Court would rule consistent with the majority of jurisdictions if it were confronted with this issue. Therefore, we conclude that Reliance was not obligated to provide coverage under any of appellants' theories of liability.

For these reasons, the judgment appealed is AFFIRMED.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION DATED AND FILED JUNE 22, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 3:97-CV-663BN

RELIANCE NATIONAL INSURANCE COMPANY

PLAINTIFF

VS.

ESTATE OF MICHAEL D. TOMLINSON, DECEASED; TOMLINSON AVIONICS OF MISSISSIPPI, INC.; TOMLINSON AVIONICS, INC.; LELIA BRANNING TUCKER; LESTER BRANNING; SCOTT BRANNING; MONICA HANCOCK; AND MICHAEL D. RIVES

DEFENDANTS

OPINION AND ORDER

Reliance National Insurance Company ("Reliance") brings this declaratory judgment action seeking a declaration that it does not have a duty to defend Tomlinson Avionics, Inc. and Tomlinson Avionics of Mississippi, Inc. ("Tomlinson" or "Tomlinson entities") for their liability arising out of an accident involving an aircraft owned by Tomlinson. All parties have filed Motions for Summary

Judgment. The issue is whether Tomlinson is covered under the Reliance policy. Having considered the Motions, briefs of the parties, and applicable legal authorities, the Court finds that Reliance does not have a duty to defend the Tomlinson entities because the Reliance policy excludes coverage for accidents involving airplanes owned by the Tomlinson entities.

I. BACKGROUND

This case arises out of a fatal airplane crash which injured Monica Hancock and Michael B. Rives and killed the pilot Michael D. Tomlinson and April Branning. The crash occurred at the John Bell Williams Airport at Raymond, Mississippi. Rives, Hancock, and the heirs of April Branning filed suit in state court against Michael Tomlinson's estate, Tomlinson Avionics, Inc., Tomlinson Avionics of Mississippi, Inc., and Hinds Community College.

Hinds Community College is the administrative authority for the John Bell Williams Airport. Reliance issued a policy to Hinds that covered Hinds for any liability it may incur as airport manager. This policy contained an exclusion for an accident involving an aircraft owned by the insured.

Before the crash, Hinds leased the airport to Tomlinson Avionics, Inc. Thereafter, Tomlinson acted as airport manager of the John Bell Williams Airport. Tomlinson Avionics, Inc. formed Tomlinson Avionics of Mississippi, Inc. Tomlinson Avionics of Mississippi, Inc. acted as Tomlinson Avionics, Inc.'s agent and fulfilled the obligations of airport manager. The Court will refer to the two entities as the Tomlinson entities.

Appendix B

On October 25, 1994, Michael Tomlinson, an employee of the Tomlinson entities, consumed several beers at Swayze's Recreation Center. While drinking, Tomlinson met April Branning, Monica Hancock, and Michael Rives. He convinced them to take a late night ride in an airplane owned by the Tomlinson entities and piloted by him. The plane crashed shortly after takeoff.

After this accident, Rives, Hancock, and the heirs of Branning ("state court Plaintiffs") filed separate suits in the Circuit Court of the Second Judicial District of Hinds County, Mississippi against Michael Tomlinson's estate, the Tomlinson entities, and Hinds Community College ("Hinds").

The only Defendants left in this litigation are the Tomlinson entities. Summary judgment was granted in favor of Hinds in state court. The state court Plaintiffs settled with Michael Tomlinson's estate and agreed to only seek insurance proceeds that may be available from any insurance the Tomlinson entities procured.

The Tomlinson entities were covered by several insurance policies including policies issued by Titan Insurance Company ("Titan"), Ranger Insurance Company ("Ranger"), and Reliance. Titan agreed to make its policy limits available to the state court Plaintiffs. Summary judgment was granted in favor of Ranger. Thus, Reliance is the only insurance company left in this case.

Reliance filed this declaratory judgment action seeking a determination that the policy of insurance it issued to Hinds

provides no coverage to the Tomlinson entities. All parties have filed Motions for Summary Judgment.

II. SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure states in relevant part that summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c). The United States Supreme Court has held that this language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Moore v. Mississippi Valley State Univ.*, 871 F.2d 545, 549 (5th Cir. 1989); *Washington v. Armstrong World Indus.*, 839 F.2d 1121, 1122 (5th Cir. 1988).

The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record in the case which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The movant need not, however, support the motion with materials that negate the opponent's claim. *Id.* As to issues on which the non-moving party has the burden of proof at trial, the moving party need only point to portions of the record that

demonstrate an absence of evidence to support the non-moving party's claim. *Id.* at 323-324. The non-moving party must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324.

Summary judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact exists. The district court, therefore, must not "resolve factual disputes by weighing conflicting evidence, . . . since it is the province of the jury to assess the probative value of the evidence." *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 892 (5th Cir. 1980). Summary judgment is improper where the court merely believes it unlikely that the non-moving party will prevail at trial. *National Screen Serv. Corp. v. Poster Exchange, Inc.*, 305 F.2d 647, 651 (5th Cir. 1962).

III. DISCUSSION

A. Reliance has no Duty to Defend the Tomlinson Entities because the Policy has an Owned Aircraft Exclusion.

The Reliance policy clearly contained an exclusion for "bodily injury" arising from the use of an "aircraft owned by or rented or loaned to the insured or in flight by or for the account of the insured." The allegations in the state court complaint clearly fall within the exclusion. It is undisputed that the Tomlinson entities owned the airplane that crashed.

The Court notes that in a case involving these same facts but a different insurance company, Judge Tom S. Lee granted summary judgment in favor of Ranger Insurance Company

because of an owned aircraft exclusion. *See Ranger Ins. Co. v. Heirs of Branning*, 984 F.Supp. 466, 468-70 (S.D. Miss. 1997). Ranger issued a policy to the Tomlinson entities. Like Reliance's policy, Ranger's policy had an exclusion for bodily injury arising out of the use of an aircraft owned or operated by an insured. Judge Lee found that since the accident arose out of a plane owned by the Tomlinson entities, Ranger did not have a duty to defend. Accordingly, this Court finds that Reliance does not have a duty to defend because this accident involved an aircraft owned by Tomlinson.

B. Does the Exclusion Apply to Tomlinson?

The state court plaintiffs argue that the owned aircraft exclusion only applies to the named insured. They argue that the exclusion does not apply to the Tomlinson entities because the named insured is Hinds.

The Court notes that the policy had a Persons Insured provision which states:

> The "Persons Insured" provision is amended to include any airport manager of the named insured while acting within the scope of his duties.

It is undisputed that the Tomlinson entities were airport managers, thus, they are covered by the insurance policy. Accordingly, the Court finds that the owned aircraft exclusion applies to the Tomlinson entities.

The arguments raised by the state court Plaintiffs are inconsistent. On the one hand, the state court Plaintiffs argue

that the Tomlinson entities are insureds under the Reliance policy in their effort to collect proceeds under the policy. On the other hand, they argue that the Tomlinson entities are not named insureds under the Reliance policy and the owned aircraft exclusion does not apply to the Tomlinson entities. Such a construction of this policy would not comport with logic or common sense. The Court finds that the Tomlinson entities are insureds under the Reliance policy, however, Reliance does not have a duty to defend the Tomlinson entities because the policy excludes coverage for accidents involving airplanes owned by the Tomlinson entities.

III. CONCLUSION

IT IS THEREFORE ORDERED that the Motion for Summary Judgment filed by Plaintiff Reliance National Insurance Company [52-1] is well taken and is granted.

IT IS FURTHER ORDERED that all other pending motions in this case are denied as moot. The Clerk is hereby ordered to terminate all pending motions in this case including [2-1], [10-1], [18-1], [35-2], [40-1], [61-1], and [67-1].

A Final Judgment will be entered this day as required by Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED this the 22nd day of June, 1998.

s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITIONS FOR REHEARING DATED AND FILED JUNE 2, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60486

RELIANCE NATIONAL INSURANCE COMPANY, a corporation

Plaintiff – Counter Defendant – Appellee

v.

ESTATE OF MICHAEL D TOMLINSON, Deceased; ET AL

Defendants

LELIA BRANNING TUCKER, the mother of April Tenille Branning on behalf of Lester Branning, father of April Tenille Branning and Scott Branning, brother of April Tenille Branning and heirs and wrongful death beneficiaries of April Tenille Branning; LESTER BRANNING; SCOTT BRANNING; MICHAEL D RIVES

Defendants – Counter Claimants – Appellants

Appendix C

LELIA BRANNING TUCKER, the mother of April Tenille Branning on behalf of Lester Branning, father of April Tenille Branning and Scott Branning, brother of April Tenille Branning and heirs and wrongful death beneficiaries of April Tenille Branning; MICHAEL B RIVES

Plaintiffs

v.

ESTATE OF MICHAEL D TOMLINSON; ET AL

Defendants

Appeals from the United States District Court for the Southern District of Mississippi, Jackson

ON PETITIONS FOR REHEARING

Before POLITZ, WIENER, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above case are denied.

ENTERED FOR THE COURT:

s/ Henry A. Politz
United States Circuit Judge

APPENDIX D — EXCERPTS FROM OPINION OF THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI IN *PROVIDENCE WASHINGTON INSURANCE COMPANY v. CAROL ENGLISH, AS ADMINISTRATRIX OF THE ESTATE OF JOHN WESLEY WEBB, et al.* DATED AND DECIDED OCTOBER 3, 1995

IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI

NO. 93-CA-00921 COA

PROVIDENCE WASHINGTON INSURANCE COMPANY

APPELLANT

v.

CAROL ENGLISH, AS ADMINISTRATRIX OF THE ESTATE OF JOHN WESLEY WEBB, RUSSELL CHASE WEBB, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, KIMBERLY BYRD WEBB AND KIMBERLY BYRD WEBB, INDIVIDUALLY

APPELLEES

* * *

TRIAL JUDGE: HON. ROBERT LEWIS GIBBS

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

Appendix D

ATTORNEY FOR APPELLANT: RICHARD L. KIMMEL

ATTORNEY FOR APPELLEES: J. DEWAYNE THOMAS

NATURE OF THE CASE: DECLARATORY JUDGMENT; INSURANCE COVERAGE

TRIAL COURT DISPOSITION: DECLARATORY JUDGMENT IN FAVOR OF THE APPELLEES

BEFORE FRAISER, C.J., DIAZ, AND PAYNE, JJ.
DIAZ, J., FOR THE COURT:

* * *

[9] However, other state courts have created an alternative line of cases this Court thinks are worth addressing since this is a case of first impression in Mississippi. Those cases hold that where there is an allegation of "acts of negligence which are completely independent of and totally unrelated to [the insured's] ownership and use of the vehicle. . ." the homeowner's policy may provide coverage. *Johns v. State Farm Fire & Casualty Co.*, 349 So. 2d 481, 485 (La. Ct. App. 1977). In *Johns*, the plaintiff sued for damages from injuries sustained from a fall in which a motor vehicle was involved. *Id.* at 481. The trial court granted the homeowner's insurer a summary judgment because of an exclusionary clause for injuries arising out of use of an automobile. *Id.* at 482. The court of appeals reversed the trial court's decision because it concluded that questions of fact remained. *Id.* at 485. Specifically, the court found that if the trier of facts found

that the insured [10] was liable to the plaintiff for negligent supervision, then the homeowner's exclusion for use of a motor vehicle would not apply. *Id.*

This rule of law creates the clear distinction between the case of *Love ex rel. Smith v. McDonough* and the case before the Court. The trier of fact in the underlying negligence and wrongful death suits could find that Webb was liable for negligent entrustment, negligent supervision, and for the wrongful death claim. Upon such a finding then both the homeowner's policy and Webb's automobile policy, if any, could be responsible for the claims. *See State Farm Ins. Co. v. Seefeld*, 481 N.W.2d 62, 64 (Minn. 1992) ("An individual may recover against both an automobile and homeowner's policy where two independent acts, one vehicle related [negligent entrustment] and one non-vehicle related [negligent supervision], combine to cause an injury."). Also, in the case of *Frazier v. State Farm Mut. Auto. Ins. Co.*, 347 So. 2d 1275, 1276-77 (La. Ct. App. 1977), the court held that in a negligent supervision suit brought on behalf of a child who was in the care of the insurers' insured when injured by an automobile, the homeowner's insurer could be held responsible for negligent supervision claims. The holding in *Love* is applicable to a case alleging negligent entrustment only. However to cases alleging negligent supervision as well, this Court finds that the above discussed cases make it clear that upon a finding of negligent supervision, the homeowner's policy would provide coverage.

* * * *

APPENDIX E — MANDATE OF THE SUPREME COURT OF MISSISSIPPI IN *PROVIDENCE WASHINGTON INSURANCE COMPANY v. CAROL ENGLISH, AS ADMINISTRATRIX OF THE ESTATE OF JOHN WESLEY WEBB, et al.* DATED SEPTEMBER 26, 1996

MANDATE
From the
SUPREME COURT OF MISSISSIPPI

To the Hinds County Circuit Court,
First Judicial District — GREETINGS:

On 5th Day of September, 1996, in proceedings held in the Courtroom, Carroll Gartin Justice Building, the City of Jackson, Mississippi, the Supreme Court of Mississippi entered a final judgment as follows:

Supreme Court Case #93-CT-00921-SCT
Trial Court Case #9167396

Providence Washington Insurance Company

vs.

Carol English, As Administratrix of the Estate of John Wesley Webb, Russell Chase Webb, By And Through His Mother and Next Friend, Kimberly Byrd Webb and Kimberly Byrd Webb, Individually

Joint Motion to Dismiss Appeal of Providence Washington Insurance Company pursuant to M.R.A.P. 42(b) granted. Appeal dismissed upon entry of this order. Pittman, J.,

Appendix E

Prather and Sullivan, P.JJ., Banks, McRae, Roberts, Smith and Mills, JJ., Concur. Lee, C.J., Not Participating. Any costs remaining shall be paid by Appellant. Order entered.

YOU ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

WITNESS, the Hon. Dan Lee, Chief Justice of the Supreme Court of Mississippi; also the signature of the Clerk and the Seal of said Court hereunto affixed, in the City of Jackson, on September 26, 1996, A.D.

s/ Linda Stone
Supreme Court Clerk

APPENDIX F — AIRPORT LIABILITY INSURANCE POLICY FOR HINDS COMMUNITY COLLEGE/ JOHN BELL WILLIAMS AIRPORT DATED MARCH 7, 1994

AIRPORT LIABILITY INSURANCE POLICY

* * *

☒ Reliance National Insurance Co.
Corporation Trust Center, Wilmington, DE 19801

POLICY NUMBER: NAL196 3703

* * *

DECLARATIONS

ITEM 1. NAMED INSURED: Hinds Community College/ John Bell Williams Airport

* * *

SPECIAL AIRPORT PROVISIONS

* * *

With respect to the premises designated in the policy as an airport and all operations necessary or incidental thereto:

1. The "Persons Insured" provision is amended to include any airport manager of the **named insured** while acting within the scope of his duties as such.

* * *

Appendix F

3. The exclusion in the policy with respect to aircraft applies only to aircraft owned by or rented or loaned to the **insured** or **in flight** by or for the account of the **insured.**

4. The insurance does not apply:

* * *

(b) to that portion of any loss arising out of the ownership, maintenance or use of aircraft or **automobiles** with respect to which the **insured** has other valid and collectible insurance, whether primary or excess.

* * * *

APPENDIX G — EXCERPTS FROM COMPREHENSIVE GENERAL LIABILITY INSURANCE — COVERAGE PART

[Page One]

COMPREHENSIVE GENERAL LIABILITY INSURANCE — COVERAGE PART

I. COVERAGE A — BODILY INJURY LIABILITY

* * *

Exclusions

This insurance does not apply:

* * *

(b) to **bodily injury** or **property damage** arising out of the ownership, maintenance, operation, use, loading or unloading of

(1) any **automobile** or **aircraft** owned or operated by or rented or loaned to the **named insured,** or

* * *

Appendix G

[Page Three]

DEFINITIONS

* * *

"insured" means any person or organization qualifying as an **insured** in the "Persons Insured" provision of the applicable insurance coverage. The insurance afforded applies separately to each **insured** against whom claim is made or suit is brought, except with respect to the limits of the company's liability;

* * *

[Page Four]

"named insured" means the person or organization named in Item 1. of the declarations of this policy;

* * * *